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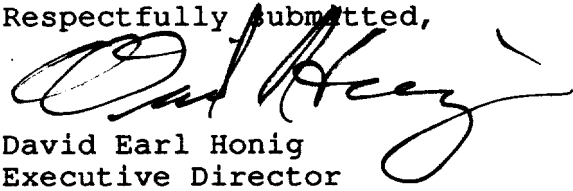
Hon. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

Dear Ms. Salas:

RE: MM Docket No. 99-325  
(Digital Audio Broadcasting)

On behalf of the Minority Media and  
Telecommunications Council ("MMTC"), transmitted  
herewith are the original and eleven copies of  
our Reply Comments.

Respectfully submitted,

  
David Earl Honig  
Executive Director

Enclosures

cc (w/enclosures):

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Digital Audio Broadcasting ) MM Docket No. 99-325  
Systems And Their Impact On )  
Terrestrial Radio Broadcast )  
Service )

TO THE COMMISSION

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**REPLY COMMENTS OF THE MINORITY  
MEDIA AND TELECOMMUNICATIONS COUNCIL**

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February 22, 2000

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**SUMMARY**

In these Reply Comments, the Minority Media and Telecommunications Council (MMTC) proposes that the Commission take these steps:

1. make AM-FM technical parity a matter of highest priority
2. allocate TV Channel 6 for DAB to supplement IBOC or another DAB allotment plan
3. use eligibility criteria to promote minority ownership in any new spectrum available for DAB.

America's airwaves are split into separate and unequal technical facilities -- a longstanding "analog divide" which preceded the digital divide by two generations. Minorities own only 2.9% of all broadcast stations. The value of these holdings is less than 1% of industry asset value because minorities tend to own stations with weak technical characteristics.

The low intrinsic value of spectrum occupied by minority owners makes it difficult for them to compete for access to the capital needed for companywide growth. Although 45.8% of America's commercial radio stations are AMs, 62.0% of America's minority owned radio stations are AMs. AM listenership stands at only about 15.7% of all radio listenership.

Furthermore, the AM stations owned by minorities tend to be technically inferior. While the median frequency of the nation's AM stations is approximately 1150 kHz, the median frequency of minority owned AMs is 1330 kHz. Forty percent of minority owned AMs use directional antennas, and 52% are daytimers or broadcast with less than 1 kw at night.

These disparities in spectrum asset value are directly traceable to discrimination and its effects. Up to now, the Commission has failed to correct those deficiencies. Remedial steps should be undertaken immediately. The Commission can begin by taking the race-neutral step of equalizing the technical characteristics of AM and FM radio in the course of transitioning to DAB service.

MMTC agrees with National Public Radio that the Commission's proposal to transfer TV Channel 6 spectrum to DAB is creative and worthy. MMTC endorses it wholeheartedly.

Whether through the allocation of TV Channel 6 or through the allocation to DAB of other new spectrum, the Commission should adopt an allocation procedure that helps remedy the present effects of the Commission's own former ratification and validation of the discrimination of its licensees. The procedure that is the least intrusive and easiest to administer is eligibility criteria, such as those used in Clear Channel Broadcasting in the AM Broadcast Band (Report and Order), 78 FCC2d 1345, 1368-69 (1980) ("Clear Channels"), recon. denied, 83 FCC2d 216 (1980), aff'd sub nom. Loyola University v. FCC, 670 F.2d 1222 (D.C. Cir. 1982).

\* \* \* \* \*

**DEDICATION TO THOMAS J. JOHNSON**

Until his passing in 1998, MMTC's engineer, Thomas J. Johnson, provided MMTC with assistance and advice on DAB -- and on most of the other hard-fought spectrum management proceedings discussed here. See pp. 10-13 infra. He never charged us a cent. Even though we lost all of those battles, it's hard to imagine a greater gift one could make to the cause of minority ownership.

Before opening Lechman and Johnson with his friend Peter Lechman, Tom Johnson was the FCC's first Black "supergrade" engineer, becoming Chief of the AM Branch. At Lechman and Johnson, Tom helped dozens of minority broadcasters design and build their own radio stations. Few have lived so full and productive a life.

In 1999, MMTC inducted Tom Johnson, posthumously, into its Hall of Fame. These comments are lovingly and respectfully dedicated to his memory.

\* \* \* \* \*

The Minority Media and Telecommunications Council ("MMTC") endorses certain of the Commission's proposals in its Notice of Proposed Rulemaking, 64 F.R. 61054, FCC 99-327 (released November 1, 1999) ("DAB NPRM"). MMTC also urges the Commission to make the promotion of minority ownership a top priority in its management of the radiofrequency spectrum.<sup>1/</sup>

### **Background**

The civil rights community has long championed the "larger and more effective use of radio in the public interest", 47 U.S.C. §303(g). Many of us were among the first to endorse DAB service and urge the Commission to develop it in a manner that promotes minority ownership.<sup>2/</sup> Thus, we applaud the Commission for recognizing the urgent need for more outlets for local expression. The needs of minority radio listeners are especially urgent, and it is on their behalf that we offer these Reply Comments.

#### **I. DAB Should Place AM And FM Broadcasters On An Equal Technical Footing**

The Commission has "tentatively conclude[d] that any DAB system should, to the maximum extent possible, accommodate all existing broadcasters that desire to initiate DAB system transmissions. A digital service that permits both AM and FM stations to provide the same level of enhanced audio quality would also be of significant benefit to broadcasters and listeners."<sup>3/</sup>

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1/ The views expressed in these Reply Comments are the institutional views of MMTC and do not necessarily reflect the views of any individual MMTC officer, director or member.

2/ See Comments of the NAACP, LULAC, National Hispanic Media Coalition and National Black Media Coalition in GEN Docket No. 90-357 (filed October 12, 1990).

3/ DAB NPRM at 14 ¶32.

However, the Commission also tentatively concluded "that placing AM and FM broadcasters on an equal footing in terms of signal quality is not an essential DAB technical requirement."<sup>4/</sup>

We respectfully disagree. AM and FM technical parity should be the paramount technical goal of this proceeding. With 38.4% of the commercial and noncommercial signals<sup>5/</sup> but only 15.7% of the radio listenership,<sup>6/</sup> AM is in trouble and it needs help now. Bringing about AM-FM technical parity is the single most important race-neutral step the Commission could take to promote minority media ownership.

Minorities own only 2.9% of all broadcast stations.<sup>7/</sup> The value of these holdings is less than 1% of industry asset value because minorities tend to own stations with weak technical characteristics.

Minorities are the disproportionate owners of AMs, and a disproportionate number of minority-owned AMs have inferior technical characteristics. Although 45.8% of America's commercial radio stations are AMs,<sup>8/</sup> 62.0% of America's minority owned

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4/ Id.

5/ According to Broadcasting and Cable Yearbook - 1999 at xxix, at the end of 1998 there were 12,472 radio stations on the air, of which 4,793 were AMs, 5,662 were commercial FMs and 2,017 were noncommercial FMs.

6/ Figure derived from market sample of Fall, 1998 audience shares as reported in BIA, Investing in Radio - 1999 Radio Market Report.

7/ NTIA, "Minority Commercial Broadcast Ownership in the United States" (August, 1998) ("Minority Ownership -- 1998"), Summary.

8/ See n. 5 supra.



commercial radio stations are AMs.<sup>9/</sup> Furthermore, the AM stations owned by minorities tend to be technically inferior. While the median frequency of the nation's AM stations is approximately 1150 kHz, the median frequency of minority owned AMs is 1330 kHz.<sup>10/</sup> Forty percent of minority owned AMs use directional antennas, and 52% are daytimers or broadcast with less than 1 kw at night.<sup>11/</sup>

These statistics reveal what racial segregation has done to America's airwaves. Besides church on Sunday morning, few national treasures are more segregated than the radiofrequency spectrum. Today the spectrum is divided into separate and unequal technical facilities -- a longstanding "analog divide" which preceded the digital divide by two generations. The analog divide was born of Commission policies that denied minority owned companies a chance to break into radio until well after the most valuable facilities were already licensed to Whites -- including virtually all Class B and C FMs, nearly all of the fulltime, low band AM big-stick signals, and every Class I-A AM Clear Channel facility. See pp. 6-14 infra.

In recent years, minority ownership growth has hit a ceiling, and the number of minority owned companies in radio has declined by

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<sup>9/</sup> Derived from Minority Broadcast Ownership - 1998 at 2.

<sup>10/</sup> The frequency disparity alone accounts for more than a 20% difference in coverage areas between typical nonminority owned and minority owned stations.

<sup>11/</sup> Derived from Minority Broadcast Ownership - 1998, Broadcasting and Cable Yearbook - 1998, and Broadcasting and Cable Yearbook - 1999.

a third since 1996.<sup>12/</sup> Several recent events have been responsible for the poor fortunes of minority ownership, including the end of comparative hearings and their replacement with auctions,<sup>13/</sup> the nonviability of distress sales,<sup>14/</sup> the repeal of the tax certificate policy,<sup>15/</sup> and the elimination of ownership caps.<sup>16/</sup>

These regulatory actions and omissions had such a traumatic effect because minority broadcasters were already burdened with inferior technical facilities. Weak facilities have severely impaired minorities' ability to compete with other broadcasters for

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<sup>12/</sup> See Minority Ownership -- 1998 at 1 (indicating that 165 minority broadcasters own 337 of 11,524 commercial and television stations in America). The increase in minority commercial ownership between 1997 and 1998 was only slight, from 2.8% to 2.9%, a total net gain of 15 stations. The number of minority owned companies in commercial broadcasting has declined from 182 in 1997 to 165 in 1998. Id. at 1, 4. In 1994 and 1995, minority ownership of broadcast stations was higher than it is today.

<sup>13/</sup> Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, Section 3002(a)(1), codified as 47 U.S.C. 309(j) (1997).

<sup>14/</sup> The only post-1990 distress sale was a \$50,000 station in a town of 84 people 40 miles from civilization. Desert Broadcasting Co. (Memorandum Opinion and Order), (MM Docket No. 96-221), Chief, MMB (released June 18, 1997) (on file with counsel).

<sup>15/</sup> Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, Section 2, 109 Stat. 93, 93-94 (1995) (codified at 26 U.S.C. §1071 (1995)). But see S. 1711, the Telecommunications Ownership Diversification Act of 1999, introduced October 8, 1999 by Senator John McCain and Senator Conrad Burns (proposing to restore much of the tax certificate policy). The tax certificate policy was responsible for about two-thirds of all minority owned stations.

<sup>16/</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, Section 202, 110 Stat. 56 (1996). For a discussion of the adverse impact of ownership concentration on minority ownership, see generally K. Ofori, K. Edwards, V. Thomas and J. Flateau, Blackout? Media Ownership Concentration and the Future of Black Radio: Impacts of the Telecommunications Act of 1996 (1997).

advertising and listenership. Weak facilities, particularly weak AM facilities, are rarely useful building blocks for multi-station platforms.<sup>17/</sup> Weak facilities provide a weak equity base -- inhibiting minorities' ability to secure the capital needed to pay the costs of growing their companies, whether through auctions, acquisitions, or facility upgrades.<sup>18/</sup> Thus, weak facilities are a market entry barrier of the type Congress expects the Commission to identify and overcome through its regulations.<sup>19/</sup>

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<sup>17/</sup> In a market with 45 commercial radio stations, a company may own eight radio stations, five of which may be AMs or FMs. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Section 202(b)(1)(a) (1996). Not surprisingly, most eight station platforms consist of five FMs and three AMs. Many multiple station owners would own eight FM stations and zero AM stations if they could.

<sup>18/</sup> Cf. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 5th Report and Order, 9 FCC Rcd 5532, 5574 ¶101 (1994) (citing evidence that, other factors being equal, Black entrepreneurs "have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources, such as affluent family or friends.")

<sup>19/</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Section 101, codified at 47 U.S.C. §257 (1996). See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd 6280, 6281 ¶1 (1996) ("Section 257 Proceeding").

Minority ownership of weak facilities was caused by discrimination and its effects.<sup>20/</sup> For four decades, the Commission did nothing to counteract the systematic discrimination which

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<sup>20/</sup> Antionette Cook Bush and Marc S. Martin explain:

the agency granted radio licenses to exclusively non-minority applicants until 1956 and television licenses exclusively to nonminority applicants until 1973. Moreover, this disparity was further entrenched by the licensing methodology - comparative hearings - which favored applicants with experience in broadcasting. Few minorities had employment opportunities with broadcasting companies until the civil rights laws and cases concerning education, equal employment opportunities, fair housing, and voting rights in the mid-60s and early 70s - years after the valuable radio and full-power TV licenses had already been granted to nonminority applicants. Accordingly, the FCC's comparative hearing procedure contained an inherent bias in favor of nonminorities until reforms were finally adopted in 1978 (fns. omitted; emphasis supplied).

A. Bush and M. Martin, in "The FCC's Minority Ownership Policies from Broadcasting to PCS," 48 Fed. Comm. Law J. 423, 439 (1996). A detailed discussion of the difficulties minorities have faced seeking entry to broadcast ownership may be found in Comments of the Civil Rights Organizations (MMTC and 23 others) in MM Docket No. 99-25 (Low Power FM Radio), filed August 2, 1999, at 34-63.

prevented minorities from owning broadcast stations.<sup>21/</sup> Until 1978,<sup>22/</sup> the Commission repeatedly took steps that discouraged

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<sup>21/</sup> See, e.g., Southland Television Co., 10 RR 699, recon. denied, 20 FCC 159 (1955) (holding that the owner of segregated movie theaters had the character necessary to be issued a television construction permit because state segregation laws were not inconsistent with the Communications Act of 1934); Broward County Broadcasting, 1 RR2d 294 (1963) (terminating trumped-up revocation proceeding when the licensee agreed to abandon its Black format, which was opposed by the government of the segregated Fort Lauderdale suburb to which the station was licensed); The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965) (issuing only an admonishment in response to the FBI's allegation that a radio licensee helped incite the 1962 riot by Whites who sought to prevent James Meredith from integrating the University of Mississippi); Lamar Life Broadcasting Co., 38 FCC 1143 (1965), reversed and remanded, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); accepting remand, 3 FCC2d 784 (1966); aff'd, 14 FCC2d 495 (ALJ 1967); aff'd, 14 FCC2d 431 (1968); reversed and vacated, Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) (in which the Commission ultimately had to be instructed by the D.C. Circuit to deny the license renewal application of a notorious discriminator); Chapman Television and Radio Co., 24 FCC2d 282 (1970); on remand, Chapman Radio and Television Co., 21 RR2d 887 (Examiner 1971) (holding that the co-owner of a segregated cemetery, who helped preserve the segregation policy and then covered it up, had the character to be a broadcast licensee); Evening Star Broadcasting Co., 24 FCC2d 735 (1970) and 27 FCC2d 316 (1971), aff'd sub nom. Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972) (holding that a television station's EEO record would be evaluated based on the demographics of its market, not its city of license (which happened to be the majority-Black District of Columbia)); National Black Media Coalition, 61 FCC2d 1112 (1976) and Citizens Communications Center, 61 FCC2d 1095 (1976) (refusing, after an unexplained 3 1/2 year delay, to adopt any of 61 proposals to advance minority participation in the electronic mass media); NBC, Inc., 62 FCC2d 582 (1977) (Commissioners Hooks and Fogarty dissenting) (refusing to examine allegations of employment discrimination until a final order is issued in a civil lawsuit -- which broadcasters never allow to happen); Public Notice of Intent to Sell Broadcast Station, 43 RR2d 1 (1978) (rejecting Commissioner Hooks' proposal for a 45 days public notice period as a remedy for discrimination in station brokering because publicizing station sales might inconvenience some incumbent broadcasters).

<sup>22/</sup> Thanks to Chairman Wiley's and Chairman Ferris' initiative, in 1978 the Commission adopted the distress sale policy and the former tax certificate policy. Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978); see also Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982).

minority ownership,<sup>23/</sup> most notoriously including the unrestricted routine authorization and renewal of broadcast licenses for schools which used the licenses to provide segregated broadcast training.<sup>24/</sup> Thus, when minorities did have an opportunity to own stations, typically these opportunities arose when members of other historically excluded groups who had owned inferior facilities sold

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23/ See, e.g., Ultravision Broadcasting Company, 1 FCC2d 545, 547 (1965) ("Ultravision") (adopting grossly restrictive one-year-without-revenue financial qualification standard for construction permit applicants), repealed in Revision of Application for Construction Permit for Commercial Broadcast Station, 87 FCC2d 200, 201 (1981) because the Ultravision standard "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses"; 1360 Broadcasting Company, 36 FCC 1478, 2 RR2d 824 (Rev. Bd. 1964) ("1360 Broadcasting") (refusing to waive AM nighttime coverage rules to allow a first nighttime service to 98.0% of Baltimore's Black community; Member Joseph Nelson dissented, citing three examples where the Commission had granted similar waivers for nearly all-White communities); Mel-Lin, Inc., 22 FCC2d 165 (1970) ("Mel-Lin") and Champaign National Bank, 22 FCC2d 790 (1970) ("Champaign") (same rule and same outcome as in 1360 Broadcasting); PTL of Heritage Village Church, Report No. 18597 (1982), recon. denied, 53 RR2d 824 (1983), 53 RR2d 824 (1983), appeal dismissed, 760 F.2d 1297 (D.C. Cir. 1985) (allowing wrongdoer to escape hearing and distress sale liability, thereby eviscerating the distress sale policy). Cases involving failure to enforce the EEO Rule are far too numerous to mention.

24/ Minorities in many states were barred by state law or custom from attending universities operating the only FCC-licensed educational TV and radio stations. Examples include KASU-FM, Arkansas State University, licensed in 1957; WUNC-FM, University of North Carolina, licensed in 1952, and KUT-FM, University of Texas, licensed in 1958. There were many others. The average signon year for stations owned by 28 Historically Black Colleges and Universities ("HBCUs") was 1980, while the average signon year for stations licensed to the 29 predominantly White state colleges in the same states was 1970. The White schools' stations mean power level was 40.57 kw, 20% more than the HBCUs' stations' mean power level of 33.8 kw. The White schools' mean HAAT was 671.4 feet, almost 2 1/2 times the HBCUs' stations' mean HAAT of 273 feet. Thus, the HBCUs were given a late start, after which they received second class broadcast facilities. See Comments of the Civil Rights Organizations in MM Docket No. 99-25 (Low Power FM Radio), filed August 2, 1999, at 38 n. 76.

them to minorities, or lost them through distress sales.<sup>25/</sup> Consequently, minorities are saddled with a disproportionate number of high-band, daytime-only, low powered AM stations. Any further Commission tolerance of this disproportionate minority ownership of weak facilities would be both immoral and irrational.<sup>26/</sup>

In 1975, the D.C. Circuit instructed the Commission to consider the effects of its spectrum management policies on minority access to the airwaves.<sup>27/</sup> The Commission followed this policy

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<sup>25/</sup> Eastern and Southern European immigrants often built these stations to serve ethnic groups speaking Russian, Yiddish, Italian or Polish. The Commission frequently refused to issue them licenses on the thin pretext that it didn't serve the public interest to broadcast in certain foreign languages. See Voice of Brooklyn, 8 FCC 230, 248 (1940), Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938), and Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936). These broadcasters were often the first to change their formats to serve Black audiences, and later to sell their stations to African Americans -- affording ownership opportunities available nowhere else in broadcasting. Examples of stations with such a history include Washington's WOL, New York's WWRL and WLIB, Philadelphia's WHAT, Baltimore's WWIN, Pittsburgh's WAMO, Boston's WILD, Buffalo's WUFO, Chicago's WBEE and Miami's WMBM -- all AM stations owned by African Americans, and all struggling with inferior technical facilities.

<sup>26/</sup> It has been argued that it is actually good for minorities that the spectrum includes some weak facilities, because they provide a low cost way to enter broadcasting. This argument is immoral because it assumes the desirability of a Jim Crow system of broadcasting -- much like the argument that slum housing is good for minorities because it's cheap and preferable to homelessness. The argument is also irrational. Broadcast investing is based on rate of return, not initial cost. It is far more difficult to finance a non-cash flowing \$1,000,000 AM standalone purchase than it is for the same broadcaster to finance a positive cash-flowing \$10,000,000 FM station purchase.

<sup>27/</sup> Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) ("Garrett").

three times<sup>28/</sup> -- then disregarded it for the next 22 years. For nearly a generation, the Commission has seldom been at a loss for reasons not to narrow the race gap in access to the quasi-public radiofrequency spectrum. When it lacked such reasons, it simply disregarded minority groups' pleadings and said nothing at all. In Docket 80-90,<sup>29/</sup> in the 9 kHz proceeding,<sup>30/</sup> in the Domestic Clear

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28/ Atlass Communications, Inc., 61 FCC2d 995 (1976) (granting AM nighttime coverage waiver to promote minority ownership, thereby reversing the policy followed in 1360 Broadcasting, Mel-Lin and Champaign); Hagadone Capital Corp., 42 RR2d 632 (1978) (to promote minority ownership, Hawaiian AM station's nighttime authority petition was removed from the processing line and afforded expedited consideration); Clear Channels, supra, 78 FCC2d at 1368-69 (adding minority ownership as a criterion for acceptance of certain applications for new service on the domestic Class I-A Clear Channels.)

29/ The Commission considered minority needs when it created 689 new FM authorizations in Docket 80-90. Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Allotments ("Modification of FM Rules (Docket 80-90)"), 94 FCC2d 152, 159 n. 10 (1983). However, it refused to dedicate spectrum for minority ownership, preferring instead to rely on the comparative process. Id. at 179. Soon afterward, when it established comparative criteria for the Docket 80-90 stations, the Commission diluted the previously available enhancement for minority ownership by authorizing a "daytimer preference" -- on the startling assumption that operating during daylight hours renders an applicant inherently as likely to promote diversity as minorities. Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments (Second Report and Order), 101 FCC2d 638, 647-49 (1985) ("Implementation of Docket 80-90") recon. denied, 59 RR2d 1221, 1226-28 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987). Commissioner Rivera accurately characterized the weight of the daytimer preference -- which incorporated a "substantial" local ownership credit -- as so heavy that "it will be almost impossible for any newcomer - minority or non-minority - to prevail against a qualifying daytimer." Implementation of Docket 80-90, supra, 101 FCC2d at 653 (Dissenting Statement of Commissioner Henry M. Rivera). Given the Commission's failure to design Docket 80-90 to promote diversity, it is no wonder that Docket 80-90 is not looked upon as a great success in promoting minority ownership.

30/ 9 kHz Channel Spacing, 88 FCC2d 290 (1981) (Commissioners Jones and Fogarty dissenting) (preferring minor cost savings to owners of digital receivers in luxury automobiles to the creation of approximately 400 new AM stations needed primarily by minorities.)



Channel proceeding,<sup>31/</sup> in the Foreign Clear Channel proceeding,<sup>32/</sup>

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31/ In Deletion of AM Acceptance Criteria in Section 73.37(e) of the Commission's Rules (Report and Order), 102 FCC2d 548, 558 (1985) ("Clear Channels Repeal"), recon. denied, 4 FCC Rcd 5218 (1989), the Commission repealed the minority and noncommercial eligibility criteria in Clear Channels, supra, holding that a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership. Clear Channels Repeal, supra, 102 FCC2d at 558. Only thirteen minority owned stations had been created under this two-year old policy. Id., 102 FCC2d at 555.

32/ Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Report and Order), 101 FCC2d 1, 6 (1985) ("Foreign Clear Channels"), recon. granted in part, 103 FCC2d 532 (1986), reversed in part, NBMC v. FCC, 791 F.2d 1016, 1022-23 (2d Cir. 1986), on remand, Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Further Notice of Proposed Rulemaking), 2 FCC Rcd 4884 (1987), Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Second Report and Order), 3 FCC Rcd 3597, 3599-3600 ¶¶19-23 (1988), recon. denied by Memorandum Opinion and Order, 4 FCC Rcd 5102, 5103-5104 ¶¶16-20 (1989) (eliminating minority eligibility criteria on the Foreign Clears, on the theory that minorities can always apply to occupy other vacant spectrum.) Dissenting in Foreign Clear Channels, supra, 101 FCC2d at 30-31, Commissioner Rivera charged that the Commission was "backing away from our commitment to encourage minority ownership and noncommercial use of [40 potential new stations] without any record basis for doing so....The key to this riddle of the reversal without reasons is that Section 73.37(e) helps minorities (among others). For that reason, the majority is unwilling to continue the existence of this rule section. It is reluctant to explain its motivation for rejecting Section 73.37(e)(2) because it would have an insurmountable task justifying that decision when the problem of underrepresentation of minorities in the broadcast industry is so far from being resolved" (emphasis in original, fn. omitted).

in the AM expanded band proceeding,<sup>33/</sup> in the 1992 Cable Act implementation proceeding,<sup>34/</sup> in the Satellite Digital Audio Radio

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<sup>33/</sup> In deciding to give all of the expanded band to incumbents and none to minority new entrants, the Commission was quite brazen in articulating its regulatory priorities: "reserving even one channel for [minority, female and educational broadcasters'] exclusive use would assure a 10% decrease in expanded band resources dedicated to interference and congestion reduction." Technical Assignment Criteria for the AM Broadcast Service (Report and Order), 6 FCC Rcd 6273, 6307 ¶111 (1991) ("Expanded Band Report and Order"), recon. granted in part and denied in part, 8 FCC Rcd 3250, 3254 ¶¶36-37 (1993) ("Expanded Band Reconsideration Order") (subsequent history omitted) (permitting only incumbents to colonize the AM expanded band (1605-1705 kHz) and refusing to adopt minority ownership incentives for occupancy of the band, even though minority ownership had been among the primary justifications for the band's expansion in the FCC's planning for the 1979 WARC and the U.S. delegation's advocacy presented at the WARC, where the band was authorized.) The Expanded Band Report and Order failed to acknowledge the existence of, much less respond to, the extensive comments of the NAACP, LULAC and the National Black Media Coalition on this issue; the organizations weren't even listed in the Appendix as commenters. Id. at 6344-47. When the organizations sought reconsideration, advancing a less sweeping proposal, the Commission held that the new proposal "should have been submitted earlier as a comment in response to the NPRM" -- that is, as part of the same initial comments the Commission had disregarded! Adding insult to this injury, the Commission went on to justify its refusal to adopt minority incentives by claiming that it had "address[ed] the need to increase opportunities for minority ownership" when it adopted Revision of Radio Rules and Policies, 7 FCC Rcd 6387 (1992) ("Radio Rules (1992)"). Expanded Band Reconsideration Order, supra, 8 FCC Rcd at 3261 ¶37. Actually, Radio Rules (1992) was the decision that allowed additional concentration of radio ownership in spite of minority groups' (accurate) prediction that more concentration would severely inhibit minority ownership.

<sup>34/</sup> Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265 (First Report and Order), 8 FCC Rcd 3359 (1993) (failing even to acknowledge the existence of extensive comments by the Caribbean Satellite Network ("CSN"), much less CSN's arguments for (or any other discussion of) policies to foster minority ownership of cable networks. CSN, which had 1,500,000 subscribers, was the only minority-owned cable channel, besides BET, ever to launch U.S. operations.)

proceeding,<sup>35/</sup> and in this proceeding up to now,<sup>36/</sup> the Commission refused to take steps to bridge the divide between White ownership and minority ownership, or prematurely repealed modest remedial measures. The Commission has behaved as though Garrett never happened, repeatedly defying the law of that case. Thus was born the analog divide -- which now threatens to become digital.

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35/     Responding to Rules and Policies for the Digital Audio Radio Satellite Service, IB Docket No. 95-91 and GEN Docket No. 90-357 (Notice of Proposed Rulemaking), 11 FCC Rcd 1 (1995), MMTC urged the Commission to set aside channels to provide access to minority entrepreneurs. Comments of MMTC in IB Docket No. 95-91 and GEN Docket No. 90-357 (filed September 15, 1995). The Commission refused, holding that it had "relied on the representations of [the four] satellite DARS applicants that they will provide audio programming to audiences that may be unserved or underserved by currently available audio programming." Rules and Policies for the Digital Audio Radio Satellite Service, IB Docket No. 95-91 and GEN Docket No. 90-357 (Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking), 12 FCC Rcd 5754, 5791 ¶90 (1997). Thus, nonminority entrepreneurs' promise that they will offer minority-oriented formats trumped minority entrepreneurs' own proven record of diverse programming. This paternalistic holding is a radical departure from the Commission's historic commitment to minority ownership as a means of advancing diversity.

36/     Minority ownership was nowhere mentioned in Establishment and Regulation of New Digital Audio Radio Services, GEN Docket No. 90-357 (Notice of Inquiry), 5 FCC Rcd 5237 (1990) ("DARS NOI"), even though the Notice focused on providing spectrum for incumbents and for public broadcasters and inquired into the need for structural ownership restrictions. Id. at 5238 ¶11 and 5239 ¶14. Responding to the DARS NOI, four national civil rights organizations filed extensive comments and reply comments, along with an extensive study detailing the level of minority demand for DAB facilities by market. Comments of the NAACP, LULAC, National Hispanic Media Coalition and National Black Media Coalition in GEN Docket No. 90-357 (filed October 12, 1990); Reply Comments of the NAACP, LULAC, National Hispanic Media Coalition and National Black Media Coalition in GEN Docket No. 90-357 (filed January 7, 1991). The Commission neglected to mention, much less rule on the civil rights organizations' proposals or their demand study, or put the minority ownership issue out for comment in subsequent DAB proceedings. Establishment and Regulation of New Digital Audio Radio Services, GEN Docket No. 90-357 (Notice of Proposed Rulemaking and Further Notice of Inquiry), 7 FCC Rcd 7776 (1992). The DAB NPRM also says nothing about minority ownership.

In the past, when the Commission refused to promote minority ownership through its spectrum management authority, it could at least point to the tax certificate, distress sale and comparative hearing policies as alternate means.<sup>37/</sup> But with these policies repealed or eviscerated, the only tools left to promote minority ownership are spectrum management, the structural rules,<sup>38/</sup> and indirectly and to a far lesser extent, what remains of the EEO Rule.

While race-sensitive corrective steps should be undertaken as soon as practicable,<sup>39/</sup> race-neutral measures should also be undertaken where possible. In this proceeding, the Commission should take the profoundly critical race-neutral step of equalizing the technical characteristics of AM and FM radio in the course of transitioning to DAB service.

The Commission is at its best when it can find creative ways to promote minority ownership. As the Commission has long recognized, minority ownership is a valuable way to foster diversity

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37/ See, e.g., Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Memorandum Opinion and Order), supra, 4 FCC Rcd at 5104 ¶19 (minorities "would continue to enjoy a preference or qualitative enhancement in any comparative hearing proceeding that arose as a result of the filing of a competing application for use of a foreign clear channel frequency to the extent minority ownership was integrated into the overall management of the station"); Clear Channels Repeal, supra, 102 FCC2d at 558 (a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership.)

38/ Unfortunately, the Commission is usually loath to consider minority ownership in developing its structural rules. But see Multiple Ownership of AM, FM and Television Broadcast Stations (Memorandum Opinion and Order) [on reconsideration], 100 FCC2d 74, 94 (1985) (previous and subsequent histories omitted) (finding that "our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership") and Revision of Radio Rules and Policies (Second Memorandum Opinion and Order), 9 FCC Rcd 7183, 7191 ¶46 (1994) (to the same effect).

39/ See pp. 18-19 infra.

of viewpoints.<sup>40/</sup> The Courts<sup>41/</sup> and Congress<sup>42/</sup> agree.

We realize that today's FCC appreciates the value of minority ownership, but acknowledge that it will require considerable institutional will to bring about AM and FM technical parity. For two decades, the Commission has failed to do much to improve analog

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<sup>40/</sup> See Waters Broadcasting Co., 91 FCC2d 1260, 1264-1265 ¶¶8-9 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1984) (recognizing that a minority broadcaster could provide nonminorities with minority viewpoints they are unlikely to receive elsewhere.

<sup>41/</sup> Justice Brennan's majority opinion in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 580-82 (1990) concluded:

[e]vidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities...minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities.

But cf. Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344, rehearing denied, 154 F.3d 487, rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998) (in dictum, questioning whether minority broadcast employment promotes diversity.)

<sup>42/</sup> Congress has consistently affirmed the Commission's goal of promoting minority ownership. See, e.g., Cable Television Consumer Protection and Competition Act of 1992, H. Rep. 102-628, 102nd Cong. 2d Sess. 1992, at 60; 47 U.S.C. §151 (revised in 1996 to explicitly require that licensing and regulation occur "...without discrimination on the basis of race, color, religion, national origin, or sex"); H.R. Conf. Rep. 97-765, at 26 ("[An] important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities...it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public.") Several provisions of the Telecommunications Act address this issue. See 47 U.S.C. §309(j)(3)(B) (competitive bidding must result in dissemination of licenses among a wide variety of applicants including small businesses and businesses owned by minorities and women); 47 U.S.C. §309(j)(4)(c)(ii) (same with respect to assigning areas and bandwidths); 47 U.S.C. §309(j)(4)(i) (provision of spectrum based services); see also Section 257 Proceeding, supra (implementing Section 257 of the Act, which directs the Commission to promote the policies and purposes of the act favoring diversity of media voices, vigorous economic competition and technological advancement.)

inherently undesirable technical capabilities. For example, in 1982 the Commission failed to select a uniform AM stereo standard -- on the ridiculous theory that broadcasters and consumers would invest in AM stereo equipment that might become useless if an incompatible standard prevailed.<sup>43/</sup> The Commission did take the very modest step of encouraging AM broadcasters to migrate to the expanded band to reduce interference,<sup>44/</sup> but migration has been slow and has mainly improved a few stations' distant signal reach while doing little to improve most stations' in-market signal quality.

By equalizing the technical quality of AM and FM broadcasting, the Commission can do much to correct its many errors in the management of the radiofrequency spectrum, and in doing so can deliver a considerable boost to minority ownership.

## **II. The Analog TV Channel 6 Spectrum Should Be Allocated To DAB**

The Commission has sought comment on whether the spectrum currently used for TV Channel 6 could be reallocated to DAB at the end of the DTV transition.<sup>45/</sup> The Commission's proposal is creative and worthy. MMTC generally concurs with the views of National

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<sup>43/</sup> AM Stereophonic Broadcasting, 51 RRF2d 1 (1982) (Commissioners Quello and Fogarty concurring, dubitante, and Commissioner Washburn dissenting); see also AM Stereophonic Broadcasting, 3 FCC Rcd 403 (1988) (denying three petitions for rulemaking seeking a uniform AM stereo standard). Congress eventually required the Commission to select an AM stereo standard. Telecommunications Authorization Act of 1992, P.L. No. 102-538, Section 214 (1992). In 1993, the Commission selected an AM stereo standard. Amendment of the Commission's Rules to Establish a Single AM Radio Stereophonic Transmitting Equipment Standard (Report and Order), 8 FCC Rcd 8216 (1993); supplemented, 9 FCC Rcd 1907 (1994). Nonetheless, according to Broadcasting and Cable Yearbook - 1999, at xxiv, "AM stereo has not caught on, principally because many AM stations have given up on music formats and no longer care."

<sup>44/</sup> Expanded Band Report and Order, supra, 6 FCC Rcd at 6273.

<sup>45/</sup> DAB NPRM at 17 ¶41.

Public Radio, wholeheartedly endorsing the Channel 6 proposal.<sup>46/</sup> The loss of just one of our 67 TV channels would easily justify a 30% increase in the spectrum space available for FM broadcasting.

Contrary to the views of MSTV<sup>47/</sup>, the use of Channel 6 for DAB service is meritorious, independently of whether an IBOC system for DAB is feasible. If IBOC is not feasible, other spectrum, including the 6 MHz block devoted to Channel 6, could be assembled for FM broadcasting. There is no reason why all blocks of FM spectrum must be contiguous.

Nor should the Commission be inhibited by the possibility that the DTV transition might not occur until 2007 or beyond. Radio receiver manufacturers will probably need this time to produce a new generation of sets. By 2007, demand for radio service will grow along with the increased size and wider diversity of the radio listening public. On the other hand, supply will remain stagnant, thanks to the exhaustion of virtually all analog spectrum in urban areas.<sup>48/</sup>

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<sup>46/</sup> Comments of National Public Radio, Inc., filed January 24, 2000 at 8 ("demand for radio broadcast facilities has long exceeded the currently allocated spectrum, and the DAB transition represents an ideal time to address the need for additional radio broadcast spectrum.")

<sup>47/</sup> Comments of the Association for Maximum Service Television, Inc. and Certain Channel 6 Licensees (filed January 24, 2000) at 8 ("[m]ost existing radio broadcasters would not be able to transition to DAB under the Notice's new spectrum proposal.")

<sup>48/</sup> Creation of Low Power Radio Service (MM Docket No. 99-25) (Notice of Proposed Rulemaking), 14 FCC Rcd 2471, 2476 ¶11 (1999) (noting that the Commission received over 13,000 expressions of interest for LPFM stations in 1998). Interestingly, an argument used against low power FM by its detractors was that 100 watt LPFM service could not be authorized in very large markets. New full power service on TV Channel 6 would help address this concern.

To anticipate the need to increase spectrum supply to meet the growing demand, the Commission should reserve TV Channel 6 for DAB. With thoughtful planning, DAB can deliver broadcasting from three generations of spectrum scarcity and minority exclusion to a new era of spectrum abundance and full minority participation.<sup>49/</sup>

**III. New DAB Spectrum Should Be Allocated  
To Promote Minority Ownership**

The DAB NPRM asks "[t]o what extent should new channels be reserved for...new entrants?"<sup>50/</sup>

Incumbent broadcasters are not the only Americans with something worth saying on the airwaves. As described above, the need for new minority owned service is particularly great.

Unfortunately, most of the tools which had been available to promote minority ownership are unavailable now.<sup>51/</sup> Consequently, the Commission should now consider and develop the least restrictive remedial technique to apportion spectrum not earmarked for incumbents. That technique is eligibility criteria. As noted above, the Commission originally used minority ownership- promoting eligibility criteria in the Clear Channel proceeding.<sup>52/</sup> In their two years of operation, the Clear Channel eligibility criteria brought about thirteen minority-owned AM stations.<sup>53/</sup>

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<sup>49/</sup> Spectrum abundance would do much to reduce the need for program content regulation, which has been necessary because of spectrum scarcity.

<sup>50/</sup> DAB NPRM at 18 ¶47.

<sup>51/</sup> See p. 4 supra.

<sup>52/</sup> Clear Channels, supra, 78 FCC2d at 1368-69; repealed in Clear Channels Repeal, supra, 102 FCC2d at 548.

<sup>53/</sup> Id. at 554.



When DAB was first proposed in 1990, civil rights organizations endorsed "eligibility criteria for groups with the greatest need, with waiver provisions to avoid unfairness to other strong claimants[.]"<sup>54/</sup> Eligibility criteria have the advantage of being relatively easy to administer. They can be designed to serve the government's compelling interest in remedying past discrimination,<sup>55/</sup> and they can be narrowly tailored to include those whose licensing would likely meet needs the marketplace has not served well, while retaining the flexibility to accomodate other meritorious purposes.<sup>56/</sup> As it did in the Clear Channel proceeding, the Commission should include minorities among those eligible to serve the public as broadcasters.

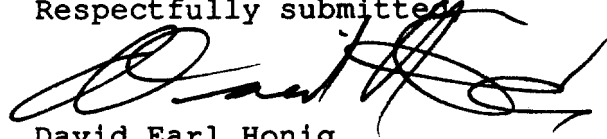
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<sup>54/</sup> Comments of the NAACP, LULAC, National Hispanic Media Coalition and National Black Media Coalition in GEN Docket No. 90-357 (filed October 12, 1990) at 1 (Summary).

<sup>55/</sup> See Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (O'Connor, J., 1995) ("[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in the country is an unfortunate reality, and government is not disqualified from acting in response to it"); Wygant v. Jackson Board of Education, 476 U.S. 267, 286, rehearing denied, 478 U.S. 1014 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[t]he Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.")

<sup>56/</sup> The eligibility criteria in Clear Channels targeted public broadcasters and minorities. Id., 78 FCC2d at 1368-70. The Commission also entertained "other meritorious uses which are proposed in applications accompanied by appropriate waiver requests." Id. at 1371.

Respectfully submitted,



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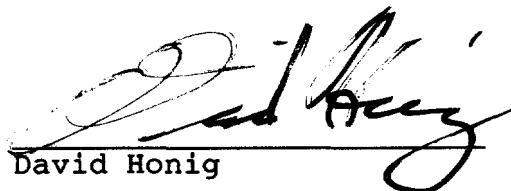
February 22, 2000

**CERTIFICATE OF SERVICE**

I, David Honig, hereby certify that I have this 22nd day of February, 2000 caused a copy of the foregoing "Reply Comments of the Minority Media and Telecommunications Council" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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